VII. INDICTMENT AND INFORMATION

A. Sherman Act Indictments or Informations

1. Distinction between indictment and information

Indictments and informations are written, formal criminal charges on which the accused is brought to trial. Fed. R. Crim. P. 7(c)(1) requires that the indictment or information be a "plain, concise and definite written statement of the essential facts constituting the offense charged." An offense punishable by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, unless indictment is waived, in which case it may be prosecuted by information.1/ A violation of 15 U.S.C. § 1, which is punishable by a maximum of three years imprisonment, must be prosecuted by indictment, unless waiver of indictment is obtained from the defendant.2/ A waiver of indictment must be obtained from the defendant in open court after he has been advised of the nature of the charge and of his rights. While indictments must be returned by a grand jury,3/ informations

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1/ Fed. R. Crim. P. 7(a).

2/ The Ninth Circuit has held that an indictment need not be returned against a corporation since the corporation can be punished only by fine. United States v. Armored Transp., Inc., 629 F.2d 1313, 1317-20 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981). The court reasoned that a crime punishable only by fine is not an "infamous crime" within the terms of the 5th Amendment. The Ninth Circuit is the only circuit to have adopted this approach.

3/ Fed. R. Crim. P. 6(f).
may be returned by the Department of Justice on its own authority.

The language of an information differs from an indictment only slightly. The opening sentence of the information will read "The United States of America, acting through its attorneys, charges" rather than "the grand jury charges". If the exact dates are unknown, the information will state "the exact dates being unknown to the United States"; an indictment will state "the exact dates being unknown to the grand jury." An information will not contain a signature line for the grand jury foreperson.

An information will be presented to the presiding judge or magistrate by the prosecuting attorneys rather than by the grand jury. It saves time to have the waiver of indictment form executed by the defendant prior to the hearing at which the information is presented to the court. Some courts, however, require that the execution of the waiver occur in open court. Therefore, you must ascertain the preferred procedure from the local U.S. Attorney's Office.

In most cases, an information will be accompanied by a plea agreement, which will be presented to the court at the time the information is presented.4/ Informations may also be accompanied by a press release similar to that used for the return of an indictment.

Unlike the return of an indictment, the defendant pleading to an information will have been given an opportunity to review the information before it is presented to the court. The charge contained in the information to which the defendant is pleading will have been negotiated

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4/ See Chapter IX for a discussion of plea agreements.

between the parties as part of the plea agreement. Within certain constraints, the nature of the charge is an appropriate subject for plea negotiation. However, the terms of the information, like the indictment, should rest exclusively with the prosecuting attorney.

It is not necessary for the grand jury to have any involvement in the return of an information, but you should usually inform the grand jury when an information has been or is being presented. In most circumstances, this will require an explanation of the accompanying plea agreement. Often, this occurs when the defendant, in the case of an individual, is testifying before the grand jury under the terms of the plea agreement. The grand jury should be advised that the information is simply a substitute for an indictment and that it was still the product of their hard work.

When the information is being filed against a corporation, the waiver of indictment must be executed by an officer empowered to act for the corporation. You should ascertain from the U.S. Attorney's Office in the local jurisdiction what proof the court will require that the officer is so empowered. Some judges will require written confirmation of a vote by the

board of directors authorizing the officer to execute the waiver of indictment and to enter any accompanying plea. Some courts will permit counsel for the corporation to perform these acts. However, the deterrent effect of requiring a high-ranking officer of a corporation to appear in court for the purpose of executing a waiver of indictment and entering a plea should not be ignored.

The court may permit an information to be amended at any time before verdict or finding, if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.5/

A sample information and indictment are contained in Appendices VII-1 and VII-2.

2. Function and purpose of an indictment or information

The indictment or information, hereafter referred to as indictment, serves as the initial pleading filed by the Government in criminal litigation. It should set forth the facts evidencing the elements of the offense sought to be charged. Each indictment will require a varying amount of factual detail. In general, it should tell the story of who the defendants are, what their roles were, what they did, when and where they did it, the scheme they used to commit the offense and a description of the offense with which they are charged.

Your goal in drafting an indictment is to tell the Government's story in a simplified and persuasive manner, keeping

in mind that the document itself will be seen and scrutinized by the trial judge, the jury, defense counsel, the press, the probation officer and the court of appeals.

The indictment must adequately apprise the defendant of what theories he must be prepared to meet at trial. Further, the indictment serves as a basis for determining a defendant's 5th Amendment right against double

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5/ Fed. R. Crim. P. 7(e).

jeopardy. The 5th and 6th Amendments to the U.S. Constitution require that the indictment must describe the crime allegedly committed, every essential element of that crime, and the acts of the defendant alleged to constitute the crime. The description must be in sufficient detail to permit the defendant to understand the nature of the charges against him, to prepare a defense, and to invoke the double-jeopardy provision of the 5th Amendment, if appropriate.6/

The 6th Amendment provides in pertinent part: In all criminal prosecutions, the accused shall enjoy the right. . . to be informed of the nature and cause of the accusation . . . . Fed. R. Crim. P. 7(c)(1) gives effect to these requirements by providing the following:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal

commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated.

6/ Russell v. United States, 369 U.S. 749, 763-72 (1962).

In reviewing the sufficiency of an indictment, the courts will construe the document as a whole to ascertain whether or not the foregoing requirements have been met.7/ An indictment is likely to be found legally sufficient if it describes with reasonable particularity the acts or practices alleged to constitute the offense. What is required are factual allegations rather than a simple recitation of the acts or practices proscribed by the law allegedly violated. There is no requirement, however, that the indictment set forth the Government's evidence to support the factual allegations, or describe in detail the contents of any documents to which reference may be made.8/

3. Standard format for Sherman Act offenses

The Division prefers the use of a standard format for indictments charging violations of Section 1 of the Sherman Act. The purpose of this format is to communicate more effectively the nature of the criminal charges to judges, trial juries, and the general public, while fully satisfying the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure. Utilizing a standard Division-wide format has at least two advantages: it permits the development of a body of caselaw on the sufficiency of the standard Section 1 indictment which helps ensure that individual indictments will be upheld by district and appellate courts; and it facilitates the review of proposed indictments at each level within the Division. Reprinted below is a sample indictment followed by comments for each section of the indictment.9/ Section 1 indictments should be drafted in the form of this sample, subject to the exceptions noted in the comments.

7/ United States v. Hand, 497 F.2d 929, 934-35 (5th Cir. 1974), cert. denied, 424 U.S. 953 (1976); Moore's Federal Practice ¶ 7.04 (1982).

8/ See Brown v. United States, 143 F. 60, 65 (8th Cir.), cert. denied, 202 U.S. 620 (1906); United States v. Mobile Materials, Inc., 871 F.2d 902, 906-10 (10th Cir.), modified on other grounds, 881 F.2d 866 (10th Cir. 1989), cert. denied, _ U.S._ (1990).

a. Sample Sherman Act indictment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

UNITED STATES OF AMERICA)
)
v.) Criminal No.
)
XYZ COMPANY, INC. and)
JOHN W. DOE,)
) 15 U.S.C. § 1
Defendants.)

INDICTMENT

9/ An alternative sample indictment is contained in Appendix VII-3. This format may be used when the charging paragraph contains numerous terms that may not be familiar to the general public.

The Grand Jury charges:

I

DESCRIPTION OF THE OFFENSE

1. XYZ Company, Inc. and John W. Doe, its Executive Vice President, are hereby indicted and made defendants on the charge stated below.

2. Beginning at least as early as 1983 and continuing at least through September 1988, the exact dates being unknown to the Grand Jury, the defendants and others entered into and engaged in a combination and conspiracy to suppress and eliminate competition by rigging bids for the award and performance of dredging construction projects. The dredging projects were awarded from time to time by the United States, through the United States Army Corps of Engineers ("Corps") or the United States Navy ("Navy"), on the Southeast Atlantic Coast and were set aside for qualified small businesses under the Small Business Set Aside ("SBSA") program. The combination and conspiracy, engaged in by the defendants and co-conspirators was an unreasonable restraint of interstate [and foreign] trade and commerce, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

3. During the period covered by this indictment, the United States, through the Corps or the Navy, from time to time invited dredging contractors to submit sealed competitive bids on dredging projects on the Southeast Atlantic Coast, including those projects which are the subject of this indictment. Each such bid was required to be submitted to the appropriate Corps District Office or Navy Office before the time, and at the place, indicated on the bid proposal form. The receipt, opening, and reading aloud of the bids constitute a process known as a bid letting. Following a bid letting, the Corps or the Navy awards a contract for the performance of the specified dredging project to the lowest responsible bidder.

4. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to allocate among themselves SBSA dredging projects let by the Corps and the Navy on the Southeast Atlantic Coast; and

(b) to submit collusive, noncompetitive, and rigged bids, and to refrain from submitting bids, to the Corps and the Navy for such dredging projects.

5. For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and co-conspirators did those things that they combined and conspired to do, including, among other things:

(a) discussing the submission of prospective bids on SBSA dredging projects let by the Corps and the Navy on the Southeast Atlantic Coast;

(b) agreeing not to compete by designating the corporate

defendant or co-conspirator to be the successful bidder on such dredging projects;

(c) submitting intentionally high bids and refraining from submitting bids on such dredging projects; and

(d) submitting bid proposals to the Corps and the Navy on such dredging projects containing false, fictitious, and fraudulent statements and entries.

II

DEFINITIONS

6. "Southeast Atlantic Coast" means the geographic areas served by the Corps District Offices in Norfolk, Virginia; Wilmington, North Carolina; Charleston, South Carolina; Savannah, Georgia; and Jacksonville, Florida.

7. "Dredging" means the creation or maintenance of harbors, navigable channels, and other waterways through the underwater excavation of material from the bottom of such waterways and the disposal of that material.

III

DEFENDANTS AND CO-CONSPIRATORS

8. Defendant XYZ Company, Inc. is a corporation organized and existing under the laws of the

Commonwealth of Virginia, with its principal place of business in Norfolk, Virginia. During the period covered by this indictment, XYZ Company, Inc. engaged in the business of dredging as a contractor on the Southeast Atlantic Coast, including the Eastern District of North Carolina.

9. Defendant John W. Doe is, and was during the period covered by this indictment, the Executive Vice President of XYZ Company, Inc.

10. Various corporations and individuals, not made defendants in this indictment, participated as co-conspirators in the offense charged and performed acts and made statements in furtherance of it.

11. Whenever in this indictment reference is made to any act, deed, or transaction of any corporation, the allegation means that the corporation engaged in the act, deed or transaction by or through its officers, directors, employees, agents, or other representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

IV

TRADE AND COMMERCE

12. The business activities of the defendants and co-conspirators that are the subject of this indictment were within the flow of, and substantially affected, interstate [and foreign] trade and commerce.

V

JURISDICTION AND VENUE

13. The combination and conspiracy charged in this indictment was [formed and] carried out, in part, within the Eastern District of North Carolina within the five years preceding the return of this indictment.

DATED:

A TRUE BILL

_____

FOREPERSON

_____ _____

JAMES F. RILL [Lead Attorney]
Assistant Attorney General
Antitrust Division [Staff Attorney]
[Staff Attorney]

Attorneys, Antitrust Division
U.S. Department of Justice
_____ [Section or Office Address]
[Name]
United States Attorney Tel: (000) 000-0000

Eastern District of North Carolina FTS 000-0000

b. Comments

1) Caption and page format. The standard caption and page format should be modified only as necessary to comply with the local rules and practice of the U.S. Attorney. The defendants do not have to be listed in any particular order. Usually corporations are listed before individual defendants; however, with multiple defendants, greater clarity may be provided if the individual is listed right after the corporation by which that individual was employed.

2) Paragraph 1 - list of defendants. The defendants should be listed in the same order as they are listed in the caption. The identification should include the full name of each corporate defendant and the name and title of each individual defendant. If the list of defendants is significantly longer than in the sample, the titles of the individual defendants may be omitted as they are more fully described later in the indictment. In some cases, it may be appropriate to note parenthetically any alias or nicknames used by an individual defendant.

3) Paragraph 2 - main charging paragraph. This is the main charging paragraph of the indictment. It should usually contain: the approximate beginning and ending dates of the conspiracy; the specific type(s) of per se offense(s) involved; the industry involved; and, in bid-rigging cases, the letting authority. The last sentence of this paragraph should be substantially the same in all indictments.

This section should include the time period during which the offense was committed. However, there is no requirement that the beginning and ending dates of the arrangement be pled with precision. The indictment may charge that the exact dates when the alleged offense began and ended are unknown but are believed to have commenced as early as a specified year and to have continued through a specified date that is within the statute of limitations.10/

4) Paragraph 3 - explanation of industry or competitive structure. A paragraph of this type should be inserted before the "substantial terms" and "means and methods" paragraphs only when it is essential to explain some aspect of the industry or competitive structure involved so that the reader can fully understand the following paragraphs describing the conspiracy.

This paragraph of the indictment may, when necessary, contain a general description of the uses for a product or service and the types of customers for it. In a bid-rigging indictment, such as the sample indictment, it may be appropriate to explain the bidding process. Any discussion of the industry or the competitive structure important enough to be included in the indictment, but not essential to an understanding of the initial charging paragraphs, should be included in the "Trade and Commerce" section.

10/ See Devitt & Blackmar, § 55.02; see also United States v. Kissel, 218 U.S. 601, 608 (1910); United States v.

Walker, 653 F.2d 1343, 1345-50 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982).

5) Paragraphs 4 and 5 - the "substantial terms" and "means and methods" paragraphs. Although the introductory portions of the "substantial terms" and "means and methods" paragraphs should be virtually the same in every indictment, the subparts will obviously differ widely in number and structure, depending on the specific facts. Staffs will be given substantial latitude to tailor these paragraphs to fit each case.

In general, these paragraphs should describe the terms of the allegedly unlawful agreement and list how the defendants formed and carried out the unlawful combination and conspiracy. Since overt acts need not be proven in Sherman Act cases, there is no requirement that they be alleged in an indictment.11/

6) Paragraphs 6 and 7 - definitions. A "Definitions" section is not mandatory and should be included only when the ordinary dictionary definitions of terms used in the indictment will not suffice or when terms, though adequately defined in the dictionary, are not familiar to the general public. If the charging paragraph contains numerous terms that may not be familiar to the general public, then it may be advisable to have the definitions section precede the charging paragraph.12/

Terms frequently defined in this section include the geographic area where the alleged illegal action occurred, the product or service that was the subject of the conspiracy, and, if federal funding was

11/ See United States v. Socony Vacuum Oil Co., 310 U.S. 150, 252 (1940); Nash v. United States, 229 U.S. 373, 378 (1913).

12/ See Appendix VII-3 for a sample of this alternative.

involved, the federal agency that was involved. Failure to describe such terms is not fatal to an indictment, but doing so may make practical sense in some cases.13/

7) Paragraph 8 - corporate defendant descriptions. For each corporate defendant, the identification should include the full name, main business address and state of incorporation. When there are multiple corporate defendants, the paragraph should contain language similar to the following:

Each of the defendant corporations is organized and exists under the laws of the state, and has its principal place of business in the city, identified below:

Corporation	State of Incorporation	Principal Place of Business
ABC Corporation	Florida	Jacksonville, FL
Acme Corporation	Georgia	Savannah, GA
Dredging, Inc.	South Carolina	Charleston, SC
XYZ Company, Inc.	Virginia	Norfolk, VA

During all or part of the period covered by this indictment,

the defendant corporations engaged in the business of dredging as

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13/ Ordinarily, a court will take judicial notice of terms for which there is a common, undisputed understanding. See Fed. R. Evid. 201. However, some terms would not be subject to judicial notice, for example, the defendant's unique term to describe a geographic area that is different from the commonly understood term.
contractors on the Southeast Atlantic Coast, including the Eastern District of North Carolina.

In some cases, the principal place of business may not be the relevant location, and staffs may want to use another title or a narrative format to explain that corporation's geographic nexus to the charge.

8) Paragraph 9 - individual defendant descriptions. Individual defendants should be identified by full name, business affiliation and title. When there are multiple individual defendants, language similar to the following should be used for this paragraph:

During all or part of the period covered by this

indictment, each of the individual defendants was associated with the designated defendant corporation in the

position or positions indicated:

Individual	Position(s)	Corporation
John W. Doe	Executive Vice President	XYZ Company, Inc.
James T. Smith	General Manager	Dredging, Inc.
William R. Thompson	Vice President	ABC Corporation
Robert J. Wilson	Manager	Acme Corporation

9) Paragraph 10 - co-conspirator paragraph. Whenever there are non-defendant co-conspirators, this paragraph should be included in the indictment. In cases in which there are co-conspirator organizations other than corporations, an appropriate term such as "firms" or "companies" should be used in lieu of "corporations". Under Department and Division policy, alleged co-conspirators should not be identified by name unless there are compelling reasons to do so.14/ Several courts have condemned the practice of naming unindicted co-conspirators as a violation of due process and have ordered that those portions of the indictment be expunged.15/

10) Paragraph 11 - This paragraph should be included in all indictments in which a corporation is a defendant.

11) Paragraph 12 - trade and commerce paragraph. This section of the sample indictment represents a

minimally sufficient allegation of the "flow" and "effects" theories of the interstate commerce element. If there is any concern that the local court may dismiss an indictment for failure to set out the specific commerce restrained, a brief additional allegation should be added, such as follows:

The interstate [and foreign] trade and commerce included:

(a) the movement of substantial quantities of goods on dredged waterways;

(b) the movement of substantial quantities of equipment and other essential materials for use on dredging projects; and

(c) payment for dredging projects with funds from the Treasury of the United States.

14/ See U.S.A.M. 9-11.230

15/ See United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); see also United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977). The American Bar Association (ABA) has adopted a principle that "the grand jury shall not name a person in an indictment as an unindicted co-conspirator in a criminal conspiracy."

Any necessary description of the industry or the competitive structure should be included here or, as previously noted, in Paragraph 3.

It is not necessary to list all of the methods by which interstate trade and commerce will be proved at trial.

12) Paragraph 13 - Jurisdiction, venue and statute of limitations. A legally sufficient indictment should contain an allegation that the offense charged was formed or carried out, at least in part, within the jurisdiction of the federal district court where the indictment is filed. There is, however, case law to the effect that failure of an indictment to allege venue does not require dismissal.16/ The indictment should contain an allegation that the offense charged was formed or carried out, at least in part, within the statute of limitations period for the offense involved.

13) Signature format. The signature format may be modified as necessary to comply with the local rules and practice of the U.S. Attorney, but all indictments must contain the signature of the Assistant Attorney General and the lead attorney.

16/ United States v. Votteller, 544 F.2d 1355 (6th Cir. 1976); see also United States v. Branan, 457 F.2d 1062 (6th Cir. 1972). 18 U.S.C. § 3237 provides that an offense begun in one district, continued in another, and completed in yet another may be prosecuted in any of those districts.

14) Effects. There should be no "Effects" section or other description of anticompetitive harms in the

indictment.

15) Number of counts. A legally sufficient indictment should charge only one offense per count.17/ Generally, counts should be averred in order of the significance of the offense, such as the Sherman Act count followed by any mail fraud counts. Mail fraud counts should be averred in chronological order. Fed. R. Crim. P. 7(c)(1) permits an allegation made in one count to be incorporated by reference in another count. Normally, this is done by introducing such a count with the language:

> The grand jury (or if in an information, the United States) further charges: Each and every allegation of Paragraphs 1 through _ of this indictment is here realleged with the same force and effect as though each paragraph was set forth in full detail.

16) Language and tone. A well-drafted indictment should avoid legalese wherever possible and use instead commonly understood language. Naturally, when following the form of typical Sherman Act indictments, it is best to use language that courts have approved. When there is evidence of payoffs, concealment or the signing of false statements of noncollusion, it is good practice to incorporate language describing such practices in the

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17/ See United States v. Warner, 428 F.2d 730 (8th Cir.) (where two distinct crimes are charged in one count, the count is void since defendant is denied right to a unanimous concurrence of jury on each offense charged before conviction), cert. denied, 400 U.S. 930 (1970).
indictment. An indictment should avoid the use of prejudicial or inflammatory language.18/

B. Requirements for non-Sherman Act Indictments

1. Mail fraud, 18 U.S.C. § 1341

Increasingly, the Division will bring one or more counts of mail fraud in an indictment when a violation of the Sherman Act has been alleged.19/ Because an antitrust violation is a form of fraud, including a mail fraud count often helps to focus juror attention on the fraud aspects of the conspiracy.

An indictment for mail fraud under 18 U.S.C. § 1341, must sufficiently allege the two necessary elements of an offense within the statute:

(1) The accused devised or intended to devise a scheme and artifice

to defraud, and

(2) Used or caused the use of the mails in execution or attempted

execution of the scheme.20/

18/ See Fed. R. Crim. P. 7(d); United States v. Saporta, 270 F. Supp. 183 (E.D.N.Y. 1967); United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959), rev'd on other grounds sub nom. United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

19/ See U.S.A.M. 9-43.000, et seq.

20/ United States v. Young, 232 U.S.155 (1914).

The indictment must contain a reasonably detailed description of the particular scheme with which the defendant is charged.21/

A mail fraud count added to a Sherman Act indictment will begin with the language "The grand jury further charges" and will contain an introductory paragraph that realleges the appropriate paragraphs, such as the identification of the defendants, the reference to corporate defendants acting through its officers and those portions of the trade and commerce sections that describe the industry or the bid process which are relevant to the mail fraud count. Thereafter, a legally sufficient mail fraud indictment will contain language similar to the following:

Beginning as early as _____ and continuing thereafter until approximately _____ the exact dates being unknown to the Grand Jury, the defendants, together with other persons known and unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud (company) of:

(a) money; and

(b) property

It was part of said scheme and artifice to defraud that the defendants, and others known and unknown to the Grand Jury, would and did:

(a) allocate to one defendant the monthly scrap metal contract at (company)'s plants and allocate to another defendant the monthly scrap metal contract at (company)'s plant; and

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21/ United States v. Curtis, 506 F.2d 985 (10th Cir. 1974).

(b) submit collusive, noncompetitive and rigged bids at (company)'s plants in connection with the award of monthly scrap metal contracts.

On or about the dates of mailing set forth below, for the purpose of executing said scheme and artifice to defraud, and attempting to do so, the defendants did knowingly cause the following bids for (company's) plants' scrap metal contracts to be delivered by mail in (location), by the United States Postal Service, according to the directions thereon, each such use of the mails being a separate Count of this Indictment and each constituting a separate violation of Title 18, United States Code, Section 1341:

Count	Sender	Addressee	Approx. Date of Mailing
2			
3			

In McNally v. United States, 483 U.S. 350 (1987), the Supreme Court held that the mail fraud statute did not apply to schemes to defraud citizens of their intangible right to honest government. Subsequently, in Carpenter v. United States, 484 U.S. 19 (1987) , the Supreme Court clarified that the mail fraud statute did apply to schemes to defraud a victim of intangible property rights.22/ In 1988, Congress amended the mail fraud statute to expressly extend its coverage to include "a scheme or artifice to

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22/ See United States v. Italiano, 837 F.2d 1480 (11th Cir. 1988), for an extensive discussion of McNally and Carpenter and the ramifications of these cases on the application of the mail fraud statute.

deprive another of the intangible right of honest services",23/ thus expressly overruling McNally. As a consequence, the mail fraud statute applies to any fraudulent scheme involving a monetary or property interest, whether that interest is tangible or intangible, and to the intangible right to honest services.

In drafting a mail fraud charge, it is not necessary to allege that the scheme or artifice contemplated a use of the mails in its execution.24/ It is only necessary to prove that the use of the mails was reasonably foreseeable.25/ Each separate use of the mails constitutes a separate and distinct offense.26/

Other forms of mail fraud frequently alleged in antitrust indictments, aside from the mailing of bids, include the mailing of executed contracts from the owner to the low bidder and the mailing of payments or proceeds from the contract that was awarded to the low bidder.27/ It is necessary to draft the indictment so that the item that is mailed can be proven to have been mailed in furtherance of the scheme and not after the scheme was already completed. In any bid-rigging or price-fixing conspiracy, the object of the conspiracy is not just to rig bids or to fix

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23/ 18 U.S.C. § 1346.

24/ United States v. Young, 232 U.S. 155 (1914).

25/ Schmuck v. United States, 489 U.S. 705 (1989); Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Young, 232 U.S. 155 (1914).

26/ Durland v. United States, 161 U.S. 306 (1896); Badders v. United States, 240 U.S. 391 (1916).

27/ See Indictments in United States v. Sachs Electric Company, et al., 85-168 CR(4) and United States v. Washita Construction Company, et al., 84-146 W.D. Okla.

the prices, but to obtain financial remuneration.28/ Therefore, mailing of bids, mailing of contracts or the mailing of financial proceeds in payment of contractual work fall within the object of the scheme, and the mailings can be proven to have been in furtherance thereof.29/

Frequently, the mailing of a bid that contains a fraudulent representation, such as a false non-collusion affidavit will constitute the basis of a mail fraud charge. It is important to note, however, that the existence of such a false representation is not necessary to a mail fraud charge.30/ A scheme to defraud may be actionable even though no actual misrepresentation is contained in the mailing.31/

2. Wire Fraud, 18 U.S.C. § 1343

As with mail fraud, wire fraud is another non-antitrust violation that is found with increasing frequency in indictments stemming from antitrust investigations.32/ The essential elements of a wire fraud offense are:

28/ If staff is relying on the mailing of payments, it is useful to include language in the "means and methods" or "charging" paragraph that the conspirators had the expectation that the low bidder would be awarded the contract and would be paid over the course of the contract.

29/ United States v. Northern Improvement Co., 814 F.2d 540, 542 (8th Cir.), cert. denied, 484 U.S. 846 (1987).

30/ United States v. Watson-Flagg Electric Company, et al., (CR IP 84-103, S.D. Indiana).

31/ Linden v. United States, 254 F.2d 560 (4th Cir. 1958); Silverman v. United States, 213 F.2d 405 (5th Cir. 1954); Henderson v. United States, 202 F.2d 400 (6th Cir. 1953).

32/ See U.S.A.M., 9-44.000, et seq.

(1) The devising of a scheme and artifice to defraud, and

(2) A transmittal in interstate or foreign commerce by means of wire, radio or television communications of writings, signs, signals, pictures, or sounds for the purpose of executing the scheme or artifice to defraud.33/

Since the wire fraud statute was patterned after the mail fraud statute, mail fraud principles have been applied to wire fraud prosecutions. Each use of an interstate instrumentality constitutes a separate offense.34/ The Division has successfully charged what amounted to attempted bid-rigs or price-fixes as a wire fraud where interstate telephone calls were used to attempt to set up the conspiracy.35/

An indictment under 18 U.S.C. § 1343, must sufficiently charge the two necessary elements of the offense -- that

the accused devised and intended to devise a scheme and artifice to defraud and transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose

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33/ United States v. Patterson, 534 F.2d 1113 (5th Cir.), cert. denied, 429 U.S. 942 (1976); United States v. Freeman, 524 F.2d 337, 339e (7th Cir. 1975), cert. denied, 424 U.S. 920 (1976); United States v. Wise, 553 F.2d 1173 (8th Cir. 1977); Lindsey v. United States, 332 F.2d 688, 690 (9th Cir. 1964); United States v. O'Malley, 535 F.2d 589, 592 (10th Cir.), cert. denied, 429 U.S. 960 (1976).

34/ Henderson v. United States, 425 F.2d 134, 138 (5th Cir. 1970); United States v. Calvert, 523 F.2d 895, 903 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

35/ See, e.g., United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990).

of executing such scheme. One indictment prosecuted by the Division charged the defendants with bid-rigging and with three counts of wire fraud based upon the transmission of bid prices from the defendants to the owner by use of telexes. The wire-fraud-charging paragraphs of the indictment were as follows:36/

> Beginning sometime in or about February 1980 and continuing thereafter until at least September 1981, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators, devised and intended to devise a scheme and artifice to defraud Nash of:

(a) money; and

(b) its right to free and open competition for the bidding on the Smallville job, such bidding to be conducted honestly, fairly, and free from craft, trickery, deceit, corruption, dishonesty and fraud.

It was part of the aforesaid scheme and artifice to defraud that the defendants and co-conspirators would and did:

(a) allocate the Smallville job to XYZ Company; and

(b) submit collusive, noncompetitive, and rigged bids to Nash for the Smallville job.

36/ Identifying details from this indictment and other indictments quoted in this section have been charged.

On or about the dates set forth below, the defendants named in each count listed below, for the purpose of

executing and carrying out the scheme and artifice to defraud, did knowingly and willfully transmit and cause to be transmitted, by means of wire communication in interstate commerce, certain signs, signals, and sounds; namely telexes containing bids, from the locations listed below to Nash in Metropolis, New York. Each such use of the wire constitutes a separate count of this indictment and a separate violation of Title 18, United States Code, Section 1343.

COUNT TWO

Defendants: XYZ Company

John Jones

Transmitted from: Gotham, Indiana

Transmitted to: Metropolis, New York

Wired on or about: April 21, 1980

COUNT THREE

Defendants: XYZ Company

John Jones

Transmitted from: Gotham, Indiana

Transmitted to: Metropolis, New York

Wired on or about: July 23, 1980

COUNT FOUR

Defendant: Richard Doe

Transmitted from: Littletown, Ohio

Transmitted to: Metropolis, New York

Wired on or about: April 21, 1980

The aforesaid scheme and artifice to defraud was carried out, in part, within the Southern District of Indiana within five years preceding the return of this indictment.

3. False statements, 18 U.S.C. § 1001

Another statute that has been used successfully as a companion criminal count to a Sherman Act indictment is 18 U.S.C. § 1001, False Statements.37/ Proof of five elements is essential to sustain a conviction under this statute: (1) a statement, (2) falsity, (3) materiality, (4) specific intent and (5) agency jurisdiction.38/ A violation requires proof that the defendant had the specific intent to make a false or fraudulent statement.39/ This requires that the statement be made knowingly or willfully. This element must, of course, be alleged in the indictment.

In a case involving the Oklahoma Department of Transportation, the indictment charged a Sherman Act violation in count 1. In the definitions section, federal aid highway was defined. In the trade and commerce paragraph, the role of the Federal Aid Highway Act, the bidding process of the Oklahoma Department of Transportation, the non-collusion affidavit required by the Oklahoma Department of Transportation and the federal

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37/ See Chapter VIII § C.

38/ United States v. Lange, 528 F.2d 1280, 1283 n.2 (5th Cir. 1976); Ogden v. United States, 303 F.2d 724, 742 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964).

39/ United States v. Lange, 528 F.2d supra.

highway administration and the Oklahoma statute requiring competition on public contracts were all set forth. In the false statement count of the indictment, these paragraphs were realleged. The charging portion of the false statement count then continued:

> On or about October 26, 1979, in the Western District of Oklahoma, (company) and (Defendant), defendants herein, willfully and knowingly made and caused to be made a false, fictitious and fraudulent statement as to material facts in a matter within the jurisdiction of the United States Department of Transportation, Federal

Highway Administration, an agency of the United States, in an affidavit submitted to the Oklahoma Department of Transportation as part of (company)'s bid proposal on Federal-Air Project F-91(15) in which the defendants stated and represented that:

> John Doe, of lawful age, being first duly sworn, on oath says, that (s)he is the agent authorized by the bidder to submit the attached bid. Affiant further states that the bidder has not been a part of any collusion among bidders in restraint of freedom of competition by agreement to bid at a fixed price or to refrain from bidding; or with any state official or employee as to quantity, quality or price in the prospective contract, or any other terms of said prospective contract; or in any discussions between bidders and any state official concerning exchange of money or other thing of value for special consideration in the letting of a contract.

when in truth and in fact, as the defendants then knew, (defendant) and (company) had participated in collusion in connection with the bid proposal for the aforesaid Federal-Aid highway construction project, let by the State of Oklahoma on October 26, 1979, in violation of Title 18, United States Code, Section 1001.

4. False, fictitious or fraudulent claims

   <u>against the government, 18 U.S.C. § 287</u>

Section 287 is very similar in form and content to § 1001, discussed above. Section 1001 involves falsification of any matter within the jurisdiction of a department or agency of the United States but does not require the presentation of a false claim against the United States or the presentation of fraudulent forms or documents in aid of making such claims. Section 287 does involve the presentation of false claims against the United States. In most respects, § 287's purpose is similar to and can be construed in the same manner as § 1001. However, in contrast to § 1001, § 287 requires proof of two additional elements: (1) a claim on the United States for money or property; (2) a presentation of a claim.40/

Under § 287, it is a violation if defendants directly present a false claim or "cause" a false claim to be presented. A violation can be found whenever a person submits a false or fraudulent claim to an individual, municipality, or state government knowing that funds for the goods or services involved come, at least in part, from the Federal Government.

40/ See U.S.A.M. 9-42.200 and .210 and cases cited therein.

Section 287 is applicable whenever antitrust violations cause an increase in the cost to the United States of goods or services, whether the goods or services are purchased directly or indirectly, in whole or in part,and where defendant submits false or fraudulent claims knowing that part of the funds they will be receiving come from the United States.41/

5. Conspiracy to defraud the Government with respect to claims, 18 U.S.C. § 286

Section 286 is a specific conspiracy statute designed to make conspiring to commit acts which violate § 287 illegal. As with § 287, § 286 requires a scheme to present a false claim to the United States for money or property. The difference, of course, is that § 286 does not require the actual presentation of the claim, merely the formation of the scheme.42/ Though not widely used, the advantage to § 286 is that it carries a ten-year prison sentence, twice that of a § 287, § 1001 or mail or wire fraud conviction.

6. Conspiracy to commit offense or to defraud United States, 18 U.S.C. § 371

41/ See United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

42/ See United States v. Downey, 257 F. 364 (D.R.I. 1919).

Section 371 is the general conspiracy statute of the criminal code. This section covers two different conspiracies: (1) conspiracy to commit any offense against the United States and (2) conspiracy to defraud the United States. Because the Sherman Act itself requires concerted action on the part of the defendants, it is not possible on double jeopardy grounds to charge a conspiracy to commit a conspiracy. It is proper, however, to charge the general § 371 violation in connection with violation of other statutes, such as mail fraud and false statements.

The second clause of § 371, conspiracy to defraud the United States, is an independent crime in and of itself not involving the violation of another substantive offense. As such, it is very broad in scope. Fraud as used in § 371 encompasses not only conspiracies that might involve loss of Government funds but also "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government."43/ In the antitrust context, § 371 could be used in those cases where federal contracts are inflated due to bid-rigging or other antitrust violations. It might also be used in cases where use of the "interstate commerce" element of a Sherman Act violation is problematic. Since § 371 does not require pecuniary loss to the United States, § 371 could be charged whenever antitrust activity results in the impairment or obstruction of any Government agency's function.44/

43/ United States v. Johnson, 383 U.S. 169, 172 (1966); Haas v. Henkel, 216 U.S. 462, 479 (1910); see United States v.

Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

44/ See U.S.A.M. 9-42.300

7. Major Frauds Act, 18 U.S.C. § 1031

The Major Frauds Act, 18 U.S.C. § 1031, enacted in 1988, provides in pertinent part that:

(a) Whoever knowingly executes, or attempts to execute any scheme or artifice with the intent --

(1) to defraud the United States; or

(2) to obtain money or property by means of false or fraudulent pretenses, representations, or premises, in any procurement of property or services as a prime contract or with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall . . . be fined not more than $1,000,000, or imprisoned not more than 10 years or both.

18 U.S.C. § 1031 applies to Sherman Act procurement conspiracies where the United States is a party to the

procurement contract and the value of the contract is $1,000,000 or more. It applies to both executed and attempted frauds. Pleading of a § 1031 count is similar to that for the second clause of a § 371 count with the added requirement that an allegation be made that the United States was a party to a contract involving $1,000,000 or more.

8. False declarations and perjury

There are two principal federal perjury statutes, 18 U.S.C. § 1621 and § 1623. The elements of both statutes are substantially the same.45/

Since virtually all perjury prosecutions brought by the Division will occur in a court proceeding or before the grand jury, only the elements of 18 U.S.C. § 1623 will be described. There are five such elements that should be addressed in an indictment:

(1) the testimony was given under oath;

(2) the testimony was given in a proceeding before or ancillary to a court or grand jury;

(3) the testimony was false in one or more of the respects charged in the indictment;

(4) the false testimony was knowingly given; and

(5) the false testimony was material.46/

The identity of the oath giver and proof that such person was competent or authorized to administer the oath are not essential elements of § 1623 and need not be included in the indictment. Instead, § 1623 merely

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45/ See Chapter VIII § A.

46/ United States v. Whimpy, 531 F.2d 768, 770 (5th Cir. 1976).

requires the prosecution to prove that the defendant was under oath at the time the false statement was made.47/

The third element of the offense is established through extrinsic proof that the testimony given by the accused was false in one or more of the respects charged, and is subject to the same standard of proof, beyond a reasonable doubt, that applies in any criminal case.48/ In a false statement count that avers several allegedly false statements in the same count, proof of any one of the specifications is sufficient to support a guilty verdict.49/ Generally, the Division's practice is to have a separate count for each separate fraudulent statement. However, related statements that are in essence the same answer to a rephrased question should be contained in the same count.

The fifth element, materiality of the false declaration, is a legal question for the court's determination.50/ Materiality has been defined broadly to include anything "capable of influencing the tribunal on the issue before it."51/ Before drafting the indictment, consult the law of the circuit for the jurisdiction you will be in for cases defining materiality.

47/ United States v. Molinares, 700 F.2d 647, 651-52 (11th Cir. 1983).

48/ United States v. Parr, 516 F.2d 458, 464 (5th Cir. 1975); 18 U.S.C. § 1623(e).

49/ United States v. Bonacorsa, 528 F.2d 1218, 1222 (2d Cir.), cert. denied, 426 U.S. 935 (1976); Vitello v. United States, 425 F.2d 416, 418 (9th Cir.), cert. denied, 400 U.S. 822 (1970).

50/ Weinstock v. United States, 231 F.2d 699, 703 (D.C. Cir. 1956); United States v. Crocker, 568 F.2d 1049, 1056 (3d Cir. 1977); United States v. Paolicelli, 505 F.2d 971, 973 (4th Cir. 1974); United States v. Bell, 623 F.2d 1132, 1134 (5th Cir. 1980); United States v. Raineri, 670 F.2d 702, 718 (7th Cir.), cert. denied, 459 U.S. 1035 (1982); United States v. Ostertag, 671 F.2d 262, 265 (8th Cir. 1982).

It is not a defect to omit a specific allegation in the indictment that defendant did in fact recall something to which he falsely responded he did not recall52/ as long as the court instructs the jury that in order to convict, it must find that defendant did in fact recall one or more of the matters in question. Nonetheless, the better practice is to include language in the charging paragraph that defendant did in fact recall the matter or matters to which he responded he didn't recall.53/

9. Obstruction of justice, 18 U.S.C. § 1503

An obstruction of justice charge is appropriate when prosecutors believe that there has been interference with the grand jury's investigative process.54/ The bases for such a charge stem most commonly from destruction or alteration of documents that were called for in a grand jury subpoena, or that were material to the investigation, or from an attempt to influence someone's grand jury testimony.55/ Such charges are usually prosecuted

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51/ Accord United States v. Lardieri, 497 F.2d 317, 319 (3d Cir. 1974); United States v. Cosby, 601 F.2d 754, 756 (5th Cir. 1979); United States v. Ostertag, 671 F.2d at 264; United States v. Molinares, 700 F.2d at 653.

52/ See, e.g., United States v. Chapin, 515 F.2d 1274 (D.C. Cir.) (the falsity of an "I don't recall" answer may be proven by circumstantial evidence that tends to show that defendant really knew the things he claimed not to know), cert. denied, 423 U.S. 1015 (1975).

53/ A sample indictment for false declarations before a grand jury is included in Appendix VII-4.

54/ See Chapter VIII § B.

55/ Attempts to influence another's grand jury testimony can also be brought under 18 U.S.C. § 1512(b).
under the broader parameters of the omnibus clause of 18 U.S.C. § 1503.56/

In charging that the defendant "endeavors" to influence, obstruct or impede, success by the defendant is not necessary.57/ As the Fifth Circuit noted in United States v. Howard, 569 F.2d 1331, 1337 (5th Cir.), cert. denied, 439

U.S. 834 (1978): "Section 1503 is a contempt statute . . . and as such is directed at disruptions of orderly procedure. Thus, it is wholly irrelevant whether defendants' actions had no ultimate effect on the outcome of the grand jury investigation: the question is whether they disturbed the procedure of the investigation."58/

Several courts of appeal have addressed the issue of whether perjured testimony can form the basis of an obstruction of justice prosecution. While the courts have held that "mere perjury" does not amount to obstruction, the great weight of authority holds that the giving of false testimony can amount to obstruction of justice when the testimony has impeded the administration of justice.59/ For example, the Fourth Circuit

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56/ A sample obstruction of justice indictment is included in Appendix VII-5.

57/ United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979); United States v. Roe, 529 F.2d 629, 632 (4th Cir. 1975); United States v. McCarthy, 611 F.2d 220 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980).

58/ See United States v. Buffalano, 727 F.2d 50 (2d Cir. 1984) ("endeavor" means less than attempt); United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984) ("endeavor" means any effort to accomplish an evil purpose the statute is designed to prevent).

59/ See United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972); United States v. Griffin, 589 F.2d 200 (5th Cir.), cert. denied, 444 U.S. 825 (1979); United States v. Gonzales-Mares, 752 F.2d 1485 (9th Cir.), cert. denied, 473 U.S. 913 (1985); United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984); United States v. Cortese, 568 F. Supp. 119 (M.D. Pa. 1983), aff'd sub nom. United States v. Osticco, 738 F.2d 426 (3d Cir. 1984), cert. denied, 469 U.S. 1158 (1985). Contra United States v. Essex, 407 F.2d 214 (6th Cir. 1969).
in United States v. Caron, 551 F. Supp. 662 (E.D. Va. 1982), aff'd mem., 722 F.2d 739 (4th Cir. 1983), cert. denied, 465

U.S. 1103 (1984), upheld (without an opinion) a false testimony-based § 1503 indictment and a concurrent indictment for perjury under § 1623 which had as its basis the same false testimony.

Because of the similarity in the evidence required to prove violations of §§ 1623 and 1503, staffs can expect that a defendant may make a multiplicity motion and argue that false statements and obstruction of justice merge into the same offense on the facts of the case. However, two courts of appeal have rejected the argument that concurrent convictions under §§ 1503 and 1623 constitute double jeopardy on the grounds that the statutory elements of each offense are "clearly distinct" and thus each statute requires proof that the other does not.60/

In addition to prohibiting the intimidation of and retaliation against grand and petit jurors and judicial officers, 18 U.S.C. § 1503 contains a catch-all, or omnibus clause prohibiting corrupt "endeavors to influence, obstruct or impede, the due administration of justice." In an omnibus clause prosecution, the Government must prove:

(1) there was a pending judicial proceeding;

(2) the defendant knew that there was a pending judicial proceeding;

(3) the defendant endeavored to influence, obstruct or impede the due administration of justice; and

60/ United States v. Bridges, 717 F.2d 1444 (D.C. Cir. 1983), cert. denied, 465 U.S. 1036 (1984); United States v. Langella, 776 F.2d 1078 (2d Cir. 1985), cert. denied, 475 U.S. 1019 (1986).

(4) the defendant's acts were done knowingly and corruptly.61/

Each of these elements must be addressed in the indictment.

10. RICO

The elements of a RICO violation are: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that defendant was employed by or associated with the enterprise; (4) that defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that defendant participated through a pattern of racketeering activity; i.e., through commission of at least two racketeering acts.62/

The crux of a RICO offense is that the defendant participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity. Proof of such participation requires a showing that the defendant committed at least two predicate acts of "racketeering activity" as defined in 18 U.S.C. § 1961(1). In addition, a showing must be made that the acts of racketeering were related to the conduct of the affairs of the enterprise

61/ United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir.), cert. denied, 441 U.S. 963 (1979); United States v. Solow, 138 F. Supp. 812, 816-17 (S.D.N.Y. 1956).

62/ United States v. Sinito, 723 F.2d 1250 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984); United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983).

and to the defendant's position within the enterprise.63/ Proof that the enterprise benefited from such conduct is not required.64/ The predicate acts of racketeering which may be charged include mail fraud, which appears specifically as a predicate offense under 18 U.S.C. § 1961(1). Sherman Act violations are not predicate acts, but mail fraud or other Title 18 offenses that are committed along with Sherman Act violations are predicate acts.65/ The Division must obtain prior approval from the Criminal Division before seeking the return of an indictment that includes a RICO charge.66/

11. Sherman Act Misdemeanor

Section 14 of the Clayton Act, 15 U.S.C. § 24, prescribes misdemeanor penalties for corporate officers participating in antitrust violations. Since 1974 when violations of the Sherman Act became felonies, this misdemeanor charge has never been used, and it continues to be the Division's policy that all antitrust violations shall be prosecuted as felonies.

63/ United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981).

64/ United States v. Provenzano, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982).

65/ See Indictment in United States v. Evans & Associates Construction Co., Inc., et al., (86-77-E, W.D. Okla.).

66/ See U.S.A.M. 9-110.101 and 110.210

12. Bribery

Occasionally, grand jury investigations will yield evidence of non-antitrust violations, such as commercial bribery. In United States v. Ross, 86-80323 (E.D. Mich.), a former purchasing agent for General Motors was charged with mail fraud stemming from a bribery/payoff scheme which was uncovered during the course of an investigation into bid-rigging by electrical contractors. Because the bribe involved the payment of money by a contractor to the purchasing agent, the agent was charged with having engaged in a scheme and artifice to deprive General Motors of money, its right to the loyal services of the agent and of its right to a bid process free from dishonesty. The Division will prosecute such a case that is discovered during a grand jury investigation even if there is no connection to an antitrust violation.

The Travel Act, 18 U.S.C. § 1952, has also successfully been used to prosecute commercial bribery in the

jurisdictions which have defined "bribery" as used in the Act to include instances of commercial bribery.67/

C. Defendant Selection

67/ United States v. Pomponio, 511 F.2d 953 (4th Cir.), cert. denied, 423 U.S. 874 (1975); United States v. Perrin, 580 F.2d 730 (5th Cir. 1978), aff'd on other grounds, 444 U.S. 37 (1979). But see United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), cert. denied, 429 U.S. 1123 (1977).

Defendant selection is an area where prosecutorial discretion will most require careful consideration. The Principles of Federal Prosecution state that, ordinarily, the attorney for the Government should initiate or recommend federal prosecution if the attorney believes that the person's conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. Thus, under the Principles, the standard is one of "probable conviction."

Internally, it is the Division's policy to prosecute corporations that have engaged in criminal activity and also their officers and agents when the evidence so warrants. Because a corporation cannot be sentenced to jail, prosecution of individuals who commit the illegal acts is one of the most potent deterrents to antitrust violations. The case law on corporate

liability for the illegal acts of its agents in the antitrust context has uniformly been favorable.68/

One of the most important considerations in defendant selection will be the impact a prosecutor's decision will have on the outcome at trial. Unless the evidence is quite strong, inclusion of marginal or "fringe" defendants will not help with conviction before a jury. The lack of factual strength as to marginal defendants will often weaken the overall strength of the case against other defendants. In addition, it must be remembered that

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68/ See United States v. Koppers, 652 F.2d 290 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); United States v. Automated Medical Laboratories, 770 F.2d 399, 406-08 (4th Cir. 1985); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

for every defendant added to an indictment, the trial judge will accord that many more jury selection strikes, each Government witness will face additional cross-examination, and the jury will hear that many more opening statements and closing arguments in favor of the defense.

Division attorneys must strive to apply a consistent standard that will result in fairness and even-handed treatment for all potential defendants. The prosecutor must be guided by the Principles of Federal Prosecution and see to it that cases are brought when warranted and that appropriately culpable defendants are included within the prosecution.

D. Drafting Pitfalls

1. Intent

In bid-rigging and price-fixing indictments, words such as "intentionally" should not appear because the criminal intent required to violate the Sherman Act is defined as general intent, not specific intent. That is, in a per se case, the prosecution may establish the requisite criminal intent by demonstrating that the defendants knowingly joined or participated in a conspiracy to engage in the prohibited activity.69/ The

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69/ United States v. Koppers Co., 652 F.2d 290, 294-95 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. Continental Group, Inc., 603 F.2d 444, 461-62 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Portsmouth Paving Corp., 694 F.2d 312, 317-18 (4th Cir. 1982); United States v. Cargo Serv. Stations Inc., 657 F.2d 676, 683-84 (5th Cir. Unit B Sept. 1981), cert. denied, 455 U.S. 1017 (1982).

prosecution does not need to prove that a defendant had a specific intent to restrain trade.70/ Accordingly, proof that the defendant knowingly joined or participated in a conspiracy to fix prices sufficiently establishes defendant's "conscious purpose" to restrain trade.71/ No additional evidence of intent is required.

In indictments charging non-Sherman Act offenses, you should track the language of the statute involved in the charging paragraphs. What you must be aware of is case law concerning intent that is engrafted onto certain statutory charges that must be reflected in the indictment. For instance, the statutory elements of obstruction of justice, 18 U.S.C. § 1503, require only that the defendant endeavored to influence, obstruct or impede the due administration of justice.

However, when the obstruction of justice charge is based on defendant's perjury, the Government must allege that defendant "did influence, obstruct and impede" justice as well as "endeavored to influence, obstruct and impede" justice.72/

2. Vagueness

70/ United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1106-07 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

71/ United States v. Koppers Co., 652 F.2d at 294-95; United States v. Portsmouth Paving, 694 F.2d at 317-18.

72/ United States v. Griffin, 589 F.2d 200, 204 (5th Cir.), cert. denied, 444 U.S. 825 (1979); United States v. Perkins, 748 F.2d 1519, 1528-29 (11th Cir. 1984); United States v. Caron, 551 F. Supp. 662, 670 (E.D. Va. 1982), aff'd mem., 722 F.2d 739 (4th Cir. 1983), cert. denied, 465 U.S. 1103 (1984).

An indictment is legally sufficient if it sets forth the elements of the offense, informs the defendant of the nature of the charges against him, apprises the defendant of what he must be prepared to meet at trial and protects the defendant against double jeopardy.73/ A valid antitrust indictment need not list specific transactions nor name all co-conspirators.74/ Nonetheless, a standard defense practice has been to file motions to dismiss based upon lack of specificity in indictments charging an antitrust offense. Courts have routinely denied such motions as long as the indictment carefully followed the

language of the Sherman Act.75/ Specifically, motions to dismiss because an indictment fails to allege an overt act fail because no overt acts need be alleged or proved in Sherman Act cases.76/

3. Surplusage

Surplusage refers to language in an indictment that is unnecessary to its meaning, and does not affect its validity. Language in an indictment that is neither material nor relevant to the charges contained in the indictment may be deemed to be surplusage.77/

In drafting indictments, attorneys should try to avoid surplusage. The trial court has discretion to strike language

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73/ Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Mobile Materials, Inc., 871 F.2d 902, 906 (10th Cir.), modified on other grounds, 881 F.2d 866 (10th Cir. 1989), cert. denied, _ U.S. _ (1990). Mobile Materials contains a particularly good discussion on the necessary detail for a valid indictment.

74/ United States v. Mobile Materials, Inc., 871 F.2d at 907.

75/ See Criminal Antitrust Litigation Manual, 9:2.1[8-2], p. 160.

76/ United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Mobile Materials, Inc., 871 F.2d at 909.

from an indictment because it is surplusage. A court should do so only if the language is irrelevant, inflammatory and prejudicial.78/

E. Statute of Limitations

A properly pled charge must contain an allegation that the offense charged was formed or carried out, at least in part, within the jurisdiction of the federal district court where the indictment is filed and within the period of limitations for the offense involved. A typical jurisdiction and venue paragraph reads: "The conspiracy charged in this indictment was carried out, in part, within the ___ District of ____ within the five years preceding the return of this indictment."

77/ See United States v. Terrigno, 838 F.2d 371, 373 (9th Cir. 1988).

78/ Fed. R. Crim. P. 7(d); Wright, Federal Practice and Procedure, Criminal 2d § 127 at 426-27; United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971); United States v. Climatemp, Inc., 482 F. Supp. 376, 391 (N.D. Ill. 1979); United States v. Ahmad, 329 F. Supp. 292, 297 (M.D. Pa. 1971), aff'd, 705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134 (1983).